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Nos. 82-5279 and 82-5331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARTHUR DIXSON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

JAMES LEE HINTON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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THE REPLY

THE GOVERNMENT, WITH THE ESPOUSED PURPOSE OF ELUCIDATING THE "PLAIN MEANING" OF "PUBLIC OFFICIAL" WITHIN THE FEDERAL BRIBERY STATUTE, RESORTED TO THE METHOD OF APPROPRIATING FROM TWO SUPREME COURT DECISIONS LANGUAGE ABOUT THE BROAD SWEEP OF TWO OTHER CRIMINAL STATUTES AND THEREBY CONCLUDED THAT THE "PLAIN MEANING" OF "PUBLIC OFFICIAL" WITHIN THE FEDERAL BRIBERY STATUTE ENCOMPASSES ANY PERSONS ADMINISTERING FEDERAL PROGRAMS; THE REST OF THE GOVERNMENT BRIEF IS A SERIES OF CIRCULAR ARGUMENTS THAT ASSUME WHAT THEY ARE INTENDED TO PROVE—NAMELY, THAT PETITIONERS IN THEIR EMPLOYMENT WITH UNITED NEIGHBORHOODS, INCORPORATED (UNI) WERE PUBLIC OFFICIALS BECAUSE THEY ACTED "FOR OR ON BEHALF OF THE UNITED STATES, OR ANY DEPARTMENT, AGENCY, OR BRANCH OF GOVERNMENT THEREOF IN ANY OFFICIAL FUNCTION."

The facts in this case are not in dispute. Petitioners, Arthur Dixson and James Lee Hinton, were, respectively, the executive director and rehabilitation coordinator of UNI. UNI, a community based non-profit corporation,[1] entered into an agreement with the City of Peoria to administer a Community

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[1] In the heading of its main argument, the Government describes UNI as a "quasi public corporation." (Govt. Br. 13). This is inaccurate and misleading. Although a "quasi public corporation" ("more commonly and more correctly styled 'public service corporation' ") is not a public corporation, strictly speaking, nevertheless, such a corporation, to be so designated, must be "organized for governmental purposes and contribute to the comfort, convenience, or welfare of the general public, such as telegraph and telephone companies, water and electric light companies, and irrigation companies." Black's Law Dictionary 309 (rev. 5th ed. 1979). In contrast, UNI had the long-range plans of creating a self sufficient and desirable community (Govt. Exhibit 19, p. 1) and, even in the administering of this federal grant for the City of Peoria, was assisting *individual* home owners rather than providing a *public* utility.

Block Grant Program for it (J.A. 41, 50, 54, 64), and received in excess of one million dollars to provide assistance to homeowners in the center southside of the City of Peoria. (J.A. 35). During this same period of time, the City of Peoria received in excess of $23 million in Community Development Block Grant Funds. (Govt. Exhibit 12, p. 3).

Petitioners agree with the Government that if, in their employment with UNI, they constituted "public officials" within the purview of the Federal bribery statute, they did so as:

> person[s] acting for or on behalf of the United States, or any department, agency, or branch of Government thereof. . . in any official function, under or by authority of any such department, agency, or branch of Government. . . . [18 U.S.C. 201(a)].

To be sure, the one and only issue before this Court is whether petitioners, as employees of UNI, were members of that class of "public officials," defined above—namely, the class of persons who are deemed "public officials" even though they are not Federal employees.

The Government's position is that the plain language of the statute establishes that petitioners are included within its reach. (Govt. Br. 13). In other words, the Government claims it is obvious from a mere reading of the above statutory language that petitioners are being described by it.

(i)

The Government's *A Priori* Determination Of The So-Called "Plain Meaning" Of The Statute

The Government, with the stated objective of establishing the plain meaning of the above statutory language, found that its words " 'do not lend themselves to restrictive interpretation' *United States* v. *Culbert*, 435 U.S. 371, 373 (1978)." (Govt. Br. 15). In *Culbert*, however, the Court was referring not to the breadth of the language of the bribery statute but to that of the Hobbs Act, which, according to the Court, "sweeps within it all persons who have 'in any way or degree . . . affect[ed]

commerce by robbery or extortion.' 18 U.S.C. 1951(a) (1976 ed.)," *Culbert, supra, id.*

The Government argued for an almost limitless sweep of the bribery statute, not by analyzing the ordinary meaning of the nouns and adjectival phrases of Section 201(a), but by fiat. The first sentence in its would-be search for the plain meaning of the statute is the conclusion: "The federal bribery statute is remarkable because '[t]he statutory language is sweeping' (*Lewis* v. *United States, supra,* 445 U.S. at 60)." (Govt. Br. 14). But in *Lewis*, the Court was not speaking about the bribery statute, but the scope of the firearms statute. In the words of the Court:

> An examination of Section 1202(a)(1) reveals that its proscription is directed unambiguously at any person who "has been convicted by a court of the United States or of a State . . . of a felony." No modifier is present, and nothing suggests any restriction on the scope of the term "convicted." [*Lewis* v. *United States*, 445 U.S. 55, 60 (1980)].

The Court in both cases concluded to the sweeping scope of the criminal statute it was considering by analyzing the plain meaning of the class of persons described in the statutes—respectively, "persons guilty of robbery or extortion that affects commerce" and "persons who have been convicted of a felony by a U.S. court."

In contrast, in the instant case, the Government, despite its announced objective of arriving at the plain meaning of "public official" within Section 201(a), failed to analyze any of the terms of the statute. Furthermore, inasmuch as the construction of the class of persons entailed by "person[s] acting for or on behalf of the United States or any department, agency, or branch of Government thereof in any official function" is crucial to an understanding of the plain meaning of the statutory language, the Government cannot claim to have arrived at the plain statutory meaning without even a word of discussion about this language.

The Government argued that the words "or" and "any" as used in the statute are most significant in establishing that the

plain statutory meaning of "public official" is sweeping.[2] (Govt. Br. 15). These two words, "or" and "any," are defined in Webster's Third International Dictionary as "function words."[3] Such a function word expresses "primarily grammatical relationship (as a preposition, auxiliary verb, conjunction, conjunctive adverb, or relative)—called also *empty word, form word.*" Webster's Third International Dictionary. Such a word is a syncategorematic—*i.e.*, "not capable of standing alone as a term in a proposition: having significance only in conjunction with another expression." *Id.* Consequently, it is incredible that the Government should make any point about the use of these words.

In order to find a key to the sweeping scope of the statute because of the use of "or" in two particular instances, the Government had to begin its quotation with "officer *or* employee *or* person acting for or on behalf of . . ." (Govt. Br. 15). (Emphasis supplied by Government). But, surely, the statute is not sweeping because it covers Federal officers and employees, a fact that is not at issue in the instant case. Rather, if the statute is sweeping, it must be sweeping because of the one remaining category of persons covered by it—namely, "persons acting for or on behalf of the United States in any official function. . . ."

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[2] In the words of the Government:

> " 'Congress included no limiting modifier in the statute to restrict bribery prosecutions to persons having an employment relationship with the federal government. To the contrary, the terms of the statute expressly reach any "officer *or* employee *or* person acting for or on behalf of the United States, or *any* department, agency, or branch of Government thereof, in *any* official function' (18 U.S.C. 201(a), emphasis added)." (Govt. Br. 15).

[3] "Any" is defined as ". . . 1b: one, no matter what one: EVERY—used as a function word esp. in assertions and denials to indicate one that is selected without restriction or limitation of choice (*any* child would know that) (forbidden to enter *any* house) . . ." Webster's Third International Dictionary.

"Or" is defined as "-1 used as a function word to indicate (1) an alternative between different or unlike things, states, or actions." *Id.*

That the Government found evidence of the plain meaning of the statute from the fact that the word "any" is used in two particular instances (*i.e.*, "acting for or on behalf of the United States, *any* department, agency, or branch of Government thereof . . . in *any* official function") is tantamount to finding significance in the fact that the word "a" is used twice, since the words "any" and "a" are both function words and can be used almost interchangeably.[4]

The Government's point here seems to be that, inasmuch as Congress used an indefinite modifier of "person" and "official function," this reveals in the language itself, Congress' intent to give a far-reaching, almost limitless scope to the statute. But this inference is unjustified since all statutes enunciate universal propositions, whether affirmative or negative. Accordingly, all statutes must use the indefinite "any" or "a," which make clear that the statute applies to each and every member of the class described. Thus, for example, "any person who . . ." or "a thing that . . ." is commonplace statutory language.

As the Government acknowledged in another place, the use of "any" in the phrase "in any official function" reflects a restriction on the statute. So, the Government reasoned that petitioner Hinton (82-5331 Br. 12-14) had misunderstood *Krichman* v. *United States*, 256 U.S. 363, 365 (1921), because in *Krichman*, the Court "did not hold that the baggage porter was not acting for or on behalf of the United States; rather the Court concluded 'that the porter was not discharging an official function.' " (Govt. Br. 27 n. 31).

According to fundamental principles of logic, a class term denotes the objects to which it may correctly be applied. The

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[4] The word "a" is defined as "-1 used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified, esp. when the individual is first mentioned or called to notice (there was *a* tree in the field) (*a* man walked past him) (he bought *a* house, but this is not the house he bought). . . ." Webster's Third International Dictionary.

more properties we add to the term's definition, the more restrictive is the set of its members. Accordingly, by adding to the property "persons acting for or on behalf of the United States . . ." the further requirement that such persons must be performing an "official function" and all of this activity must be "under or by authority of any such department, agency, or branch of Government . . .," we have restricted the scope of the statute.

Therefore, in view of the failure of the Government to analyze the language of Section 201(a), the Government's conclusion that the plain meaning of the statute covers "persons administering federal programs" (Govt. Br. 15) is *a priori* and gratuitous. Furthermore, the Government's attempt to prop up its argument by quoting from the Supreme Court language about the sweeping scope of *other* criminal statutes is, at the very least, misleading.

(ii)

The Apparent Reason Why The Government Has Avoided An Analysis Of The Plain Meaning Of The Statute

As noted above, the most important class term to define in articulating the plain meaning of the statutory language of Section 201(a) is the adjectival phrase "acting for or on behalf of the United States or any department, agency, or branch of Government thereof in any official function." The nouns "United States," "agency," and "branch of Government" present no problem. What requires careful examination, however, is what is the plain meaning—*i.e.*, the meaning derivable from the mere reading of the words and, therefore, independent of any knowledge of Congressional intent or judicial construction—of "acting for or on behalf of . . . in any official function."

The words "acting for or on behalf of" another immediately suggest an agency relationship in which one person, an agent, takes the fiduciary responsibility of performing duties for another, the principal. Sometimes, however, the person who has an obligation to perform certain things for another and acts

on his behalf is not the agent of the other but only under contract with the other. Such a person when not an employee of the other has an obligation to the other as an independent contractor.

Furthermore, since, according to the statutory language, it is for the Federal Government or some department, agency, or branch of the Federal Government "for whom and on whose behalf" the class of persons acts, and also this class of persons is deemed chargeable as a Federal public official, another plain meaning that suggests itself is that such persons are Federal inspectors. Such inspectors, even though not employed by the Federal Government, have the duty of applying standards for or on behalf of the Federal Government.

The phrase, "in any official function," would seem to further restrict the class of persons covered by the statute. While all those who inspect for the Federal Government and all Federal agents who perform acts within the scope of their agency would automatically satisfy the requirement of "in any official function," and thereby be subject to Section 201(a) as public officials, it seems that the vast majority of persons with a contractual relationship with the Federal Government are not properly regarded as performing an "official function" in fulfilling their obligations. Thus, for example, it would not seem proper to prosecute under the statute a building contractor who had a contract with some agency of the Federal Government and took kickbacks from a sub-contractor. Accordingly, it seems that it would have to be decided on a case-by-case basis whether someone with a contractual relationship with the Federal Government is acting "in any official function" and "under or by authority of any . . . department, agency, or branch of Government. . . .," and is thereby subject to Section 201(a).

Clearly, petitioners, in their employment with UNI, are not Federal inspectors or agents and never entered into a contract with the Federal Government. The Government, however, bent on engulfing petitioners within the net of the statutory language, rejected these three categories as the all-inclusive

and only ways someone could act "for or on behalf of the United States in any official function" without being a Federal employee. *See, e.g.*, Govt. Br. 22-23.

(iii)

Once The Government Concluded, *A Priori* And Gratuitously, That Anyone Who Administers A Federally Funded Program Is Subject To The Bribery Statute, The Government Provided Corroboration For Its Conclusion In A Series Of Question-Begging Arguments

The Government asserted that a substantial consensus exists in case law that "persons carrying on activities authorized by statute, regulation, contract, or agreement as part of a federally sponsored and supervised program are 'acting for or on behalf of the United States . . . in [an] official function' within the meaning of 18 U.S.C. 201(a)." (Govt. Br. 23). However, almost every case in which the court has found the defendant properly charged and convicted under Section 201(a) was justified by the court, or at least could have been so justified, under one of the three above rubrics—namely, the alleged bribe interfered with the integrity of a Federal inspector or an agency or contractual relationship with the Federal Government or one of its agencies, departments, or branches thereof. The two cases that are exceptions are *United States* v. *Hinton*, 683 F.2d 195 (7th Cir. 1982) (J.A. 75), the lower court's decision in the instant case, and *United States* v. *Mosley*, 659 F.2d 812 (7th Cir. 1981). Both of these Seventh Circuit decisions are aberrations.[5]

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[5] *Mosley* is a closer case than the instant case. In *Mosley*, the court affirmed the conviction of the defendant under Section 201. Mosley, employed as a CETA Intake and Eligibility Officer by the Illinois Bureau of Employment Security, allegedly took bribes in exchange for preferential treatment to CETA job applicants. The court based its decision on "substantial federal Government supervision of the local 'prime sponsors.' " *Id.* at 814. It stated that Congress had never intended to abdicate Federal control of CETA programs but had provided that state and other local governmental units serve as

1. Because, according to the Government, the contractors who dealt with petitioners recognized that the value in dealing with them was derived from their administration of federal funds, the Government argued that petitioners were "public officials" according to the very test enunciated in the Brief for Petitioners. (Govt. Br. 16). But such a conclusion, that contractors dealt with petitioners as a "surrogate, a vicar, a deputy for the Federal Government," follows only if what is at issue is assumed—namely, that persons who administer Federal funds are *ipso facto* "surrogates, vicars, or deputies for the Federal Government."

The Government has not, however, provided even a modicum of evidence that those who administer Federal funds are thereby subject to Section 201 as "public officials." So, also, it does not follow, as the Government implies in another place (Govt. Br. 11), that a "person connected with the administration of federal programs" is performing "activities for the Government in an official function."

2. The Government quoted approvingly from a First Circuit case that the clear purpose of the Federal bribery statute is "to protect the public from the evil consequence of corruption in the public service." (Govt. Br. 16.). But the only way that prosecuting petitioners can be viewed as protecting the public

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prime sponsors simply to make the program more efficient and responsive to local needs. *Id.* at 815.

Mosley, however, was a State of Illinois employee and thus subject to being hired and fired by the State and not the Federal Government. He could not be deemed a Federal inspector or someone with an agency relationship with the Federal Government or someone under contract with the Federal Government. In *Mosley*, contrary to the instant case, however, the State of Illinois as a prime sponsor had a contractual relationship with the Federal Government. (To be precise, "[t]he City of Chicago was the 'Prime Sponsor' of its CETA program. However, through a contract between the City and the United States Department of Labor . . ., IBES was substituted for the City to perform intake, assessment and referral services. . . .") (*Id.* at 813 n. 1).

from "the evil consequences of corruption in the public service" is precisely by assuming what is at issue—namely, that petitioners in their employment with UNI were "in the public service." And, in the context of Section 201(a), the assumed "public service" must be "Federal public service."

3. The Government concluded its long review of the legislative history of Section 201(a) in particular and bribery statutes within the common law in general, with the statement that "Congress' purpose [in the present 1962 statute] was to speak expansively to cover all persons who exercise official power for or on behalf of the federal government."[6] (Govt. Br. 22). But the expression "persons who exercise official power for or on behalf of the federal government" is, on its face, neither expansive nor restrictive.

4. According to the Government, the Federal Government has "a strong and legitimate interest in prosecuting petitioners for their misuse of government funds" (Govt. Br. 38); and Section 201(a) may very well be the only statute under which petitioners are reasonably subject to prosecution. For, "[t]he purpose of the federal bribery statute is to assure that federal governmental powers are exercised honestly and are not corrupted by inducements for private gain." (Govt. Br. 39).

Here, again, the Government is guilty of a circular argument—of assuming that petitioners, as employees of UNI, in their alleged taking of kickbacks from private contractors, were misusing "federal governmental powers." *Id.* Furthermore, the Government is making use of an illegitimate argument in suggesting that the Court must hold the applicability of Section 201(a) to petitioners since, otherwise, petitioners might escape criminal prosecution. As Justice Rehnquist,

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[6] It seems incredible that the Government should argue for the recent great expansion of the scope of the bribery statute, when it has found the language "any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof" in an 1878 Federal bribery statute. (Govt. Br. 18).

speaking for the majority in *United States* v. *Maze*, 414 U.S. 395 (1974), in construing 18 U.S.C. 1341, the mail-fraud statute, has stated: "If the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not the Court." *Id.* at 405 n. 10.

CONCLUSION

Because petitioners in their employment with UNI cannot be deemed to have served as either Federal inspectors or agents for the Federal Government or individuals with contractual obligations with the Federal Government, their convictions should be reversed.

Respectfully submitted,

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